10433

(18,638.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 108.

JAMES G. JAMES, APPELLANT,

vs.

GEORGE H. APPEL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a-1 In the Supreme Court of the Territory of Arizona.

Abstract of Record.

In the District Court of the First Judicial District, Territory of Arizona, in and for the County of Pima.

GEORGE H. APPEL, Plaintiff,
vs.
JAMES G. JAMES, Defendant. } No. 2579.

Second Amended Complaint.

Now comes the plaintiff herein, and amending his complaint for cause of action, alleges:

I.

That the plaintiff is a resident of the county of Pima, Arizona Territory, and that the defendant is a resident of the city and county of San Francisco, State of California.

II.

That on the 28th day of July, 1894, the Baboquivari Land and Cattle Co., a corporation, made and delivered its promissory
2 note, for value, to Minerva E. Hemme, payable one (1) day after date to the said Minerva E. Hemme, or order, in the sum of fifty thousand dollars ($50,000) with interest on the said note from date hereof, at the rate of seven (7) per cent. per annum. That at the time of executing the said promissory note, the said corporation for the purpose of securing the payment thereof, executed a chattel mortgage whereby the said corporation mortgaged to the said Minerva E. Hemme about five thousand (5,000) head of cattle and eight hundred (800) head of horses, ranging in Pima county, Arizona Territory, near the ranch of the said Baboquivari Land and Cattle Company, which said cattle and horses were branded with a brand known as the "Club" brand, and were then and there the property of the said Baboquivari Land and Cattle Company. That the said Club brand was duly recorded in the office of the county recorder of the said Pima county. That in the said mortgage were duly set out the residence of the mortgagee and mortgagor, the sum to be secured, the rate of interest to be paid, when and where payable, and that the said mortgage was duly verified and acknowledged, and in all these and all other respects complied with the requirements of par. 2364 of the Revised Statutes of this Territory. That the said mortgage was on the 27th day of August, 1894, duly deposited and filed in the office of the county recorder of this county, where the said mortgaged property was then situated.

III.

That on the 1st day of December, 1894, the said Minerva E. Hemme, for a valuable consideration, endorsed and transferred the said promissory note and the said chattel mortgage to the
3 plaintiff, who thereby became and ever since has been and now is the holder and owner of said note and mortgage.

IV.

That the said promissory note and the said chattel mortgage are still wholly unpaid, unsatisfied, and undischarged, and that the said note is due.

V.

That on or about the 1st day of January, 1895, while the said mortgage remained unsatisfied, and the lien thereof still attached to the said mortgaged property, all the interest which the said mortgagee had in the said cattle and horses of the Club brand was attempted to be attached in certain suits for debt brought in this honorable court by J. Geo. Hilzinger and Charles T. Etchells, against the said mortgagor, and that on or about April 30th, 1895, judgment was rendered in said suits against said mortgagor. That on or about October 16, 1895, all the right title and interest which the said mortgagor had at the date of the levy of said attachment in and to the said mortgaged cattle and horses was attempted to be sold under the said judgments and orders of sale made in said suits. That the said attempted sale was made to Hugo J. Donau. That thereafter the defendant acquired from the said Donau all the said Donau's right, title and interest, under the said sale in and to the said cattle and horses.

VI.

That thereafter and until the 18th day of December, 1895, the defendant made several attempts to remove the said cattle and horses out of this Territory, and several times instructed his agents so to do, but the plaintiff for the protection of his said mortgage
4 security always prevented such removal, and refused to permit the same until the said note and mortgage had been paid and satisfied, warning the defendant's agents that they would be criminally prosecuted if the said mortgaged property was removed from this county.

VII.

That shortly before and on December 18, 1895, plaintiff and defendant and one, A. Hemme, the president of the said Baboquivari Land and Cattle Company, had several conversations in the State of California, during which the defendant and the said Hemme informed and induced plaintiff to believe that there were running on the range of the Baboquivari Land and Cattle Co., in the said county of Pima, more than five thousand six hundred (5600) head of cattle,

that had been the property of the said Baboquivari Land and Cattle Co., five thousand (5000) of which were subject to the said chattel mortgage of the plaintiff, and also about two thousand (2000) head of cattle branded L Z, which said L Z brand is called and known as the "L Z" brand, and the title to which said brand and to which said cattle was in L. Zeckendorf & Co., a copartnership, doing business in the said county of Pima, composed of Louis Zeckendorf and Albert Steinfeld. Plaintiff was further informed and induced to believe by the defendant and the said Hemme that the said Baboquivari Land and Cattle Company owned an interest in the said two thousand (2000) head of "L Z" cattle, sufficient in value, over and above the interest of the said L. Zeckendorf & Co. therein to pay all or nearly all the indebtedness due or owing by the said Baboquivari Land and Cattle Company on account of the said judgments, orders of sale, and every other kind of indebtedness whatsoever, chargeable to or against any of the cattle which the said Baboquivari Land and Cattle Company, owned or had an interest in, except the amount due plaintiff on his note and chattel mortgage.

VIII.

That the said defendant, J. G. James was a thorough and experienced cattle man, and shortly before the said 18th day of December, 1895, had left California and gone on to the range of the Baboquivari Land and Cattle Co., in the said county of Pima, for the purpose of ascertaining the number of cattle and horses owned and controlled by the said Baboquivari Land and Cattle Co. That the said Hemme was the president of the Baboquivari Land and Cattle Co., and had much experience with cattle, and had frequently been down to the ranch of the Baboquivari Land and Cattle Co., and had ample opportunity to know, and claimed to know the number of cattle owned and controlled by the said Baboquivari Land and Cattle Co. That the said A. Hemme, on behalf of the Baboquivari Land and Cattle Co. was desirous of making terms between the plaintiff and defendant, and the Baboquivari Land and Cattle Co., with the aim and object of saving to the said Baboquivari Land and Cattle Co. part of the cattle herein referred to. That the plaintiff knew nothing about cattle business, horse business, or live-stock ranch business, and had never been on the range of the Baboquivari Land and Cattle Co. nor in Arizona. And plaintiff knew nothing about the L. Z. "Club" or Slipper horses and cattle, or any other of the horses and cattle of the Baboquivari Land and Cattle Co., except as was told him in the said conversations by the said James and by the said Hemme.

IX.

That for the purpose of saving litigation and law fees and expenses to the plaintiff, and of establishing the validity of the lien of his mortgage upon said mortgaged cattle, and relying upon the

representations made by the said defendant, James, the plaintiff was induced on December 18, 1895, to enter into a written agreement with the defendant, James, which recited that the plaintiff had a mortgage upon said cattle, and horses, and wherein the said defendant, James, agreed as a condition precedent to purchase and own all outstanding titles of every character whatsoever, in and to the said cattle and horses, branded with the said "Club" and "Slipper" brands, and to pay all sums due L. Zeckendorf from the Baboquivari Land and Cattle Co. on the said L Z cattle and horses, and to purchase all the right, title and interest of the said L. Zeckendorf & Co. in and to the cattle and horses, branded as aforesaid L Z; and upon the happening and completion of the conditions precedent as aforesaid, the said James agreed to ship two thousand (2000) head, more or less of cattle, branded as aforesaid L Z and to apply the appraised value thereof, which said appraised value was to be ascertained according to the terms of the said agreement, to certain payments, as follows: To repay himself first all the said defendant, James had paid L. Zeckendorf on account of the said cattle and horses, branded L Z as aforesaid, being about the sum of ten thousand dollars ($10,000). Second, to repay the sum or sums paid, or to be paid by the said defendant James to L. Zeckendorf & Co. for, and on account of two (2) certain judgments obtained as aforesaid by the said Hilzinger and the said Etchells, against the said Baboquivari Land and Cattle Co., both together amounting
7 to about the sum of nine thousand dollars ($9000). Third, James was to repay himself all sums of money heretofore advanced by the said James to the said Baboquivari Land and Cattle Co., amounting to about two thousand dollars ($2000). Fourth, the said defendant, James, was to repay all sums that might thereafter be paid by the said James for handling and caring for said horses and cattle; and, fifthly, and lastly, the said James was to pay himself eight and a half per cent. interest per annum from the dates of each of the original payments of the said James until the full amount that had been originally owed or decreed against the Baboquivari Land and Cattle Company, and which said indebtedness had been assumed by the said James, had been paid in full. That should the appraised value of the cattle and horses branded as aforesaid be insufficient to make all the payments provided for as aforesaid, then the said defendant James, was to receive at a value appraised in the same manner, and apply to the said payments, such number of "Club" and "Slipper" cattle and horses as would be necessary to raise the amount of money to complete the payments to be made the said James as aforesaid. And in consideration of the recognition of the validity of his said mortgage lien, and for the purpose of enabling the said defendant to receive and apply upon the said payments, such cattle and horses of the "Club" and "Slipper" brand as might be necessary to complete the said payments, the plaintiff agreed upon the performance of the conditions precedent aforesaid to release from the lien of plaintiff's said chattel mortgage sufficient cattle to enable the defendant by receiving and ap-

plying their appraised value as aforesaid, to repay himself the amount remaining due. But it was expressly agreed and understood
8 that before any "Club" or "Slipper" brand of cattle and horses could be taken, and their value applied as aforesaid, that all the cattle and horses branded L Z should first be purchased, and their appraised value applied to the payments hereinbefore set out to be made the said James, except that the defendant should have the right to take such cattle of the "Club" and "Slipper" brands as were suitable for selling for beef steers, and apply their value to the said payments. That the said agreement was reduced to writing and signed by plaintiff and defendant, and agreed to by the Baboquivari Land and Cattle Co., and a copy of the same is hereto attached, marked "Exhibit A" and referred to as, and made a part of this complaint.

X.

That the said agreement was made and entered into by plaintiff to save the expense, time and annoyance of the long and vexatious litigation that seemed imminent between the plaintiff and defendant, and the Baboquivari Land and Cattle Co., and under the belief induced by the defendant, James, that in addition to the L Z cattle and horses only a few of the "Club" or "Slipper" brand of cattle and horses would be required to complete the said payments, and that the full number of five thousand (5000) cattle would be left on said range to satisfy plaintiff's said cattle mortgage.

XI.

That at the time of executing the said contract the plaintiff had commenced a suit to foreclose his said chattel mortgage upon the said mortgaged property which was then situated in this county, and was about to take possession of the said mortgaged cattle and horses as under the terms of said mortgage he might have done; whereby, his lien would have been enforced and his said note and
9 mortgage satisfied; but that relying upon the representations of the defendant aforesaid, and upon the performance by the defendant of the conditions of the said contract; the plaintiff desisted from prosecuting his said foreclosure suit to effect, and refrained from taking possession of the said mortgaged cattle and horses, as by law he could have done.

XII.

That relying upon the performance by the defendant of the conditions of his said contract, that plaintiff ceased to watch the said mortgaged cattle, to watch the actions of the defendant and his agents as he before had watched them, in order to prevent the removal by the plaintiff of the said mortgaged cattle from this county.

XIII.

That the defendant never intended to carry out the terms of the said agreement, that he made no effort to carry out and did not carry out the conditions precedent to said contract to pay L. Zeckendorf & Co. the amount due said firm from the Baboquivari Land and Cattle Co. for and on account of the L Z cattle and horses, or to procure from the said L. Zeckendorf & Co. all their right, title and interest in and to the said cattle and horses. That by reason of their failure to fulfill the said conditions precedent, the defendant never acquired any right under the said contract or otherwise, to have any of the said mortgaged cattle or horses released from the lien of the plaintiff's mortgage, and that none of said cattle or horses ever were released from said lien, except by their tortious removal from this county by the defendant.

XIV.

That on or about the — day of December, 1896, while the said mortgaged cattle were subject to the lien of plaintiff's said mortgage, the defendant wrongfully, unlawfully and with force, and without the consent of plaintiff, seized, took, shipped and removed out of this county, and out of the Territory of Arizona, and converted to his own use twelve hundred and forty-two (1242) head of said cattle including bulls, steers, cows, heifers, and calves, the greater number thereof not being fit for beef, and whereof eleven hundred and four (1104) were of the cattle subject to the lien of plaintiff's mortgage as aforesaid, and only one hundred and thirty-eight (138) of the said L Z brand.

XV.

That since the execution of said contract, and while the said mortgaged cattle were subject to the lien of the plaintiff's said mortgage, the defendant has wrongfully, unlawfully, with force, and without the consent of plaintiff, seized, taken, shipped and removed out of this county and territory three thousand five hundred (3500) head of said mortgaged cattle, and converted them to his own use.

XVI.

That heretofore, and on the 29th day of October, 1895, the said defendant filed for record a certain brand made as follows **J** as the recorded brand of the said defendant, and thereafter defendant branded as cattle of the **J** brand large numbers of the cattle belonging to the "Club" and "Slipper" brands of cattle, claiming them as his property, whereas the said cattle and all thereof were cattle belonging to the "Club" and "Slipper" brands at the time the chattel mortgage held by plaintiff as aforesaid was made, executed and delivered, and all the said cattle were subject to the said mortgage, and defendant had no right to take or remove them from the county of Pima.

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XVII.

That the defendant further agreed in and by said written agreement to brand all the calves of the "Club," "Slipper" and L Z brands of cattle in and with the "Club" brand, whereas, in fact the defendant thereafter branded all the calves of the said "Club" and "Slipper" brands with the said J brand.

XVIII.

That after plaintiff learned of defendant's action in shipping out of the said Pima county, eleven hundred and four (1104) head of the cattle of all ages and sexes of the "Club" and "Slipper" brands (part of which had been branded as aforesaid with the alleged J brand) and only one hundred and thirty eight (138) head of the L Z cattle plaintiff refused to acquiesce in or ratify defendant's action and each and all the removals out of the said county of Pima and shipments of the "Club" and "Slipper" cattle, and the "Club" and "Slipper" cattle branded J were against the will, wish and consent of plaintiff, and in defiance of the rights of plaintiff under the law of the Territory of Arizona, and the said chattel mortgage and agreement.

XIX.

That the action of the defendant in thus taking and removing from the said county of Pima, the said number of 3500 head of cattle has wholly lost to plaintiff and deprived plaintiff of his security provided in the said chattel mortgage to secure the said note, by reason of the fact that the defendant gathered and shipped or sold all of the cattle and horses bearing and belonging to the said brands of the "Club," "Slipper" and J brands of cattle. That all of the

12 said cattle and horses were shipped out of the said county of Pima or sold subsequent to the making of the said agreement of December 18, 1895, and up to the time of the filing of this amended complaint. That the reasonable value of the said security for plaintiff's said chattel mortgage, being the said cattle and horses, was at the date of this amended complaint the sum of forty thousand five hundred dollars ($40,500), being the value of thirty-five hundred (3500) head of cattle so shipped as aforesaid, and five hundred (500) head of horses and three hundred (300) head of cattle sold and disposed of and placed beyond the reach of plaintiff by the defendant as aforesaid; whereby plaintiff has been damaged by defendant's wrongful actions in the sum of forty thousand five hundred dollars ($40,500).

XX.

That the Baboquivari Land and Cattle Company, and all parties otherwise liable on said note are insolvent and have been since before January, 1895, and plaintiff has and had no other security for the payment of said promissory note than the said chattel mortgage.

Wherefore, plaintiff prays for the judgment of this court for the sum of forty thousand five hundred dollars ($40,500) and for his costs of suit herein.

FRANK H. HEREFORD,
Attorney for the Plaintiff.

This agreement entered into this 18th day of December, A. D. 1895, between J. G. James, of the city and county of San Francisco, State of California, the party of the first part, and George H. Appel, of the county of Sacramento, State aforesaid, the party of the second part,

Witnesseth: That, whereas, the said Appel is the owner and
13 in possession of a certain note or notes made by the Babaquivari Land and Cattle Company in favor of Minerva E. Hemme, which note or notes subsequently came into the possession of the said Appel, in the ordinary course of business, and which note or notes are secured by a chattel mortgage covering certain personal property, to-wit, cattle and horses situated in the county of Pima, Territory of Arizona, and

Whereas, the said Appel has brought an action to foreclose said chattel mortgage, which action is now pending in the district court of the first judicial district, Pima county, Territory of Arizona, and entitled George H. Appel, plaintiff, *vs.* The Babaquivari Land and Cattle Company, a corporation, Hugo Donau, trustee; J. George Hilzinger, Charles T. Etchells, defendants; and

Whereas, the above named defendants, with the exception of The Babaquivari Land and Cattle Company and Hugo Donau, were the original owners or assignees of the following judgments entered against the Babaquivari Land and Cattle Company in the district court of the first judicial district, Pima county, Territory of Arizona, to-wit:

1st. A judgment in favor of J. George Hilzinger for five thousand one hundred and ninety-one and $\frac{37}{100}$ dollars ($5,197.37) with interest, costs, etc., and against the Babaquivari Land and Cattle Company;

2nd. A judgment in favor of C. T. Etchells for two thousand and one hundred dollars ($2,100.00) with interest, costs, etc., and against the Babaquivari Land and Cattle Company.

Whereas, attachments were issued in the said above entitled suits against the said Babaquivari Land and Cattle Company, and
14 the personal property described in the chattel mortgage above referred to held by the said George H. Appel was attached thereunder, and after judgments were secured in said cases, the said property was sold under the said judgments procured against the Babaquivari Land and Cattle Company; and

Whereas, Hugo Donau became the purchaser at said sale for the sum of two thousand two hundred and fifty dollars ($2250) and a sheriff's certificate and bill of sale was issued to him covering said personal property; and

Whereas, the said J. G. James subsequently purchased from Hugo J. Donau all his right, title and interest in and to said personal

property, to-wit, the cattle and horses branded with the Club and Slipper brand; and

Whereas, the said J. G. James has purchased all the aforesaid personal property and hereby agrees to own and possess the same as a condition precedent to the fulfilling of the terms of this contract; and

Whereas, the said J. G. James, also agrees, as a condition precedent, to pay L. Zeckendorf & Company an amount due said company from the said Babaquivari Land and Cattle Company, for and on account of all cattle and horses branded L Z and now running with the Ace of Clubs brand of cattle in Pima county, Territory of Arizona, on the range known and designated as the Babaquivari Land and Cattle Company range, lying between Poso Bueno and Arivaca and in the vicinity thereof and to procure from the said L. Zeckendorf & Company all their right, title and interest in and to said cattle and horses so branded by the L Z brand, and which cattle are now upon the range of the Babaquivari Land and Cattle Company;

Now, therefore, it is hereby agreed that the said George H.
15 Appel will release or cause to be released, sufficient of the cattle and horses described in said chattel mortgage to repay the said J. G. James the money paid to L. Zeckendorf & Company by J. G. James, on account of the said cattle and horses branded L Z, and the money paid to L. Zeckendorf & Company by the said J. G. James for and on account of two certain judgments obtained against the Babaquivari Land and Cattle Company (a corporation) in the district court of the first judicial district of the Territory of Arizona, one in favor of George Hilzinger and one in favor of C. T. Etchells and all sums and costs of money heretofore paid by J. G. James and which may hereafter be paid by him on account of said judgments, and all sums of money heretofore advanced by the said J. G. James to the said Babaquivari Land and Cattle Company and all sums of money that may hereafter be paid by him for handling, caring for said cattle and horses, with interest on all such sums at the rate of 8½ per cent. per annum from dates of each payment until paid.

That the manner of estimating the value of the said cattle shall be as follows: At any time before April 1st, 1896, the said J. G. James and the said George H. Appel will each select an appraiser, these appraisers shall place a value upon said cattle and horses per head; a sufficient number of said cattle and horses must be appraised to repay the said J. G. James the moneys paid out by him as aforesaid and the claim of L. Zeckendorf & Company to the cattle and horses branded with the L Z brand, and it is understood that the L Z brand of cattle shall first be taken and exhausted as near as practicable. At the same time taking such cattle of the Clubs and Slipper brands as may be suitable for beef, and the appraisement of all said cattle and horses shall be made and the
16–29 same delivered to the said J. G. James on the ranch or at Tucson, Territory of Arizona, and the same shall be and become the property of the said J. G. James and the said J. G.

James shall receive the same at their appraised value as aforesaid and give credit on the sums paid out by him at such appraised value from time to time until he is fully paid.

If the said two appraisers so selected by the parties to this contract are unable to agree upon the value of said cattle, then said two appraisers are required to select a third appraiser, and the three said appraisers, by a majority vote, shall fix the value of said cattle.

It is further stipulated and agreed by and between the parties hereto that the said J. G. James shall have to the first day of January, 1897, in which to perform on his part. All calves of the Club (✠), Slipper (⊂⊃), and L Z ($\frac{L}{Z}$) cattle to be branded with the Club (✠).

Witness our signatures in triplicate, this 18th day of December, 1895.

J. G. JAMES.
GEO. H. APPEL.

Witness:
E. A. FOTHERINGHAM.

We, the president and secretary of the Baboquivari Land and Cattle Company, under and by virtue of a resolution passed by the board of directors, hereby consent to the execution of the above contract and hereby ratify and confirm the same.

A. HEMME, *President.*
[SEAL.] GERTRUDE HEMME, *Secretary.*

(Endorsed:) No. 2579. Second amend. complaint. Filed this October 25th, 1897. C. D. Hoover, clerk, by A. C. Bernard dp. clerk.

* * * * * * *

30 (Title of Court and Cause.)

Amended Answer.

2. Comes the defendant and files this his amended answer herein, the same to be additional to the answer already on file in said case.

31 And for such additional answer, defendant denies each and every the allegations in said complaint contained.

3. And for a further answer defendant alleges, that he did not, at any time, take into his possession, drive or transport out of said Pima county, nor did he cause to be taken into possession, driven or transported out of the said county, any cattle included in, conveyed or covered by the chattel mortgage specified in said complaint.

4. And for a further answer defendant alleges, that the cattle, and all thereof, gathered and caused to be gathered by him in said county, and by him shipped out of said county, were cattle on which plaintiff had no lien, claim or right of any kind whatsoever.

5. And for a further answer defendant alleges, that the Baboquivari Land and Cattle Company is a corporation organized under the laws of the State of California; that the chattel mortgage specified in the said complaint alleges that said corporation was organized, among others, for the purpose of carrying on a cattle business in said Pima county; that said chattel mortgage was made on July 28th, 1894, and was filed with the recorder of Pima county on August 27th, 1894; that said corporation did not appoint any agent on whom service could be had, pursuant to the statute in such cases made and provided, and it did not have such agent, until long after said chattel mortgage had been filed as aforesaid; that by reason thereof said chattel mortgage is void, and did not and could not create any lien on the property of said corporation that was situated in said Pima county; and that the cattle described in said chattel mortgage are described as being in said county.

Wherefore, and by reason of the premises aforesaid, de-
32 fendant avers that the plaintiff, at no time, had a lien on the cattle of said corporation.

6. And for a further answer defendant alleges, that said chattel mortgage was given by the president of the said Baboquivari Land and Cattle Company to his wife, without any authority of the board of directors of said corporation so to do, and that the same is therefore unauthorized, was made without authority and is void.

7. And for a further answer defendant alleges, that the note described in the chattel mortgage specified in plaintiff's complaint, was assigned to plaintiff long after its maturity, and was assigned without any consideration whatsoever; that said note and said chattel mortgage were given by the president of the said Baboquivari Land and Cattle Company to his wife without consideration, and were given for the sole purpose of protecting and saving the cattle therein described from the creditors of said corporation, said corporation then being insolvent, and for no other purpose and with no other intent whatsoever; and that, by reason thereof, said note and mortgage are fraudulent and void.

8. And for a further answer defendant alleges, that the cattle in said complaint described as the Club and Slipper cattle, then being in said county of Pima, were, on or about October 16th, 1895, sold at public vendue by the then sheriff of the said county, by virtue of two certain executions to him directed, issued out of the clerk's office of the said district court of the aforesaid county; that said executions were issued as aforesaid by virtue of and by reason of two certain judgments theretofore rendered by said court in two certain cases then pending in said court, wherein J. Geo. Hilzinger was the plaintiff in one of them and Charles T. Etchells was the plaintiff in the other and the said Baboquivari Land and Cattle Com-
33 pany was the defendant in both of them, said judgments being against said corporation and were rendered on or about April 30, 1895.

That at said sale one Hugo Donau became the purchaser of said cattle, and of all thereof. That thereafter the defendant purchased

from the said Donau said cattle, and all thereof, and paid him therefor in money more than their full value; and that, at the time of defendant's said purchase, said cattle, nor were any thereof, mortgaged to any person whomsoever, that is to say: That at the time of the purchase of the said cattle by the defendant, as aforesaid, there was not filed in the office of the recorder of said county any mortgage covering, or upon said cattle, or any thereof.

Wherefore, and by reason of the premises aforesaid, defendant alleges that said plaintiff had no lien on any of the cattle so purchased by defendant as aforesaid, at any time, nor has he now, nor upon any thereof, and that defendant had the lawful right to gather said cattle and transport the same wheresoever he pleased.

9. And for a further answer defendant alleges, that one A. Hemme was the organizer of the said Baboquivari Land and Cattle Company and he alone owned said corporation and all of it; that said corporation was a failure, and, at the times hereinafter stated, was hopelessly insolvent; that its property and all thereof, consisted only of a herd of range neat cattle known as the Club and Slipper cattle, and some horses; that all of said property had been sold on execution sale to one Hugo Donau, on executions issued out of the clerk's office of said court by virtue of two certain judgments rendered by said court against said corporation; and thereafter, and before the times hereinafter stated, said Donau had sold the
34 same to the defendant; that defendant had paid said Donau in full therefor, and the possession thereof had been, by said Donau, turned over to defendant.

That defendant had bought and paid for such cattle, as aforesaid, on representations made to defendant as to the number and grade thereof; that after the purchase of the same defendant returned to San Francisco where the said Hemme with whom defendant had been acquainted for many years, in company with plaintiff, called upon the defendant and had an interview with him concerning said cattle, and others; and that, at said interview, it was represented to said defendant by said Hemme and acquiesced in by said plaintiff, that said cattle were worth a great deal more money than the amount that defendant had paid to Donau therefor; that there was then running with said two herds of cattle a certain other herd of cattle known as the L. Z. herd of cattle, and owned by L. Zeckendorf & Co.; that said Hemme or said corporation had a contract with said L. Zeckendorf & Co. for the purchase of said L. Z. herd of cattle, on which contract large payments had already been made, and that the value of the said L. Z. herd of cattle was greatly in excess of the amount still due said L. Zeckendorf & Co., on said contract of purchase; that the said corporation was insolvent and had no means or credit, and that the said Hemme was insolvent and had no means or credit; but that as said three herds of cattle, as represented by said Hemme and acquiesced in by said plaintiff as aforesaid, at said interview, were of a value greatly in excess of the amount defendant had paid for the said Club and Slipper cattle, and the amount still to be paid to L. Zeckendorf & Co., on the

contract of purchase of the said L. Z. cattle; and that the excess of value was the only property possessed by the
35 said Hemme, and all that said Hemme had with which to maintain himself and his family, therefore, they, the said Hemme and the said plaintiff importuned the said defendant to advance the money necessary to pay off the balance yet due to the said L. Zeckendorf & Co., on the contract of purchase of the said L. Z. cattle; and that, when this was done, the defendant would then gather the said L. Z. cattle, sell them, and with the money received therefor, to reimburse himself for the money he had so paid out in the purchase of said three herds of cattle, together with interest thereon and all expenses incurred, including such horses as were included in said sales; and that, if it should transpire, that enough of the said L. Z. cattle should not be found to repay to defendant said sum so paid and to be paid by him as aforesaid, then and in that event, defendant should sell enough of said Club and Slipper brand of cattle to make up the said amount, and the remaining cattle should be by said defendant turned over to the said plaintiff, to be held by him for and on account of said Hemme, as aforesaid, said plaintiff then and there claiming that he had a chattel mortgage on said Club and Slipper cattle which he held for the benefit of the said Hemme and his family.

That to these importunities defendant said, that he knew nothing as to the number nor as to the value of the said L. Z. cattle, but that if they were of a value sufficient to warrant him in paying the amount still due thereon to said L. Zeckendorf & Co. he would do so, otherwise he would not; that thereupon the said Hemme asserted that he knew all about said L. Z. cattle, the number and the value thereof; and that their said value was greatly in excess of the
36 amount still due thereon, as aforesaid, and the amount defendant had paid said Donau for said Club and Slipper cattle.

That defendant believing in and relying on said representations, agreed with plaintiff and said Hemme to pay the amount still due on the said L Z cattle, to then gather and market the same, and that so soon as his said advance was made by him on the said L Z cattle, the purchase price of the said Club and Slipper cattle, the expenses incurred thereon and interest thereon, he would then turn over to plaintiff the cattle still remaining on hand of said brands. That thereafter, and on or about the 18th day of December, 1895, the said plaintiff and Hemme returned to defendant with a written agreement, which they wished defendant to sign, they claiming that it correctly expressed the agreement defendant had agreed to make as aforesaid. That defendant thereupon examined said agreement and refused to sign it, and for the reason that it bound defendant, as it was then drawn, to pay the amount then due said L. Zeckendorf & Co., on said L Z cattle regardless of the amount so due and of the value of said cattle, the defendant not then having any knowledge, save the said representations of said Hemme, as to the value thereof.

That thereupon defendant amended said written agreement by

inserting therein that a sufficient number of said L Z cattle and the horses belonging to said brand should be appraised and repay to him his said advance and all thereof before he should be called upon to make the same; and the said agreement being so amended, defendant was content to execute the same and thereupon did execute the same; said contract thus executed being the one specified in plaintiff's complaint.

37-45 And defendant further alleges that thereafter he made diligent inquiry into the number and value of the said L Z herd of cattle, and into the amount due the said L. Zeckendorf & Co., thereon as aforesaid; that by means of this inquiry he learned, and now charges the fact to be, that the amount then due the said L. Zeckendorf & Co., on said contract of purchase of said L Z cattle was greatly in excess of the value of said herd, and that by reason thereof, defendant refused to advance said amount due on said L Z cattle; that, upon making the discovery that said amount still due on said L Z cattle was greatly in excess of the value of said cattle, he at once notified plaintiff thereof, and that he would not make said advance, to which plaintiff consented, then agreeing with defendant that it would be manifestly unwise so to do.

That thereafter defendant gathered all of the cattle in said Club and Slipper brand, and their increase, and all the horses in said brand, that he *he* was able to find and sold the same at their then full market value; and that the amount he received therefor was much less than the amount he had paid the said Donau therefor as aforesaid, including his necessary expenses in the gathering and sale thereof.

Wherefore, and by reason of the premises aforesaid, defendant prays to be hence dismissed with his costs in this behalf most wrongly expended.

BARNES & MARTIN AND
C. W. WRIGHT,
Attorneys for Defendant.

(Endorsed:) "2579. Defendant's amended answer. Filed May 3, 1899. Clinton D. Hoover, clerk."

* * * * * * *

46 (Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

This cause having been called regularly for trial before the court (a trial by jury having been expressly waived by the respective parties hereto), and Messrs. Hereford & Hazzard appearing as attorneys for the plaintiff, and Messrs. Barnes & Martin and C. W. Wright, Esq., appearing as attorneys for the defendant, and the court having heard the proof of the respective parties and considered the same and the records and papers in the case, and the cause having been submitted on briefs to the court for its decision, the court now finds the following facts:

*

I.

That the plaintiff is a resident of the county of Pima, Territory of Arizona, and that the defendant is a resident of the city and county of San Francisco, State of California.

II.

That on December 18, 1895, the plaintiff and defendant made a written agreement, wherein it was recited that the said plain-
47 tiff was the owner and in possession of a certain note for fifty thousand dollars, and of a certain chattel mortgage executed to secure the same on the 28th day of July, 1894, by the Baboquivari Land and Cattle Company, a corporation, upon all that brand of cattle known as the Club brand, running on the range of the Baboquivari Land and Cattle Company in Pima county, Arizona; that the plaintiff had brought an action to foreclose said chattel mortgage, he being then the assignee thereof; which said action was then pending; and that in said action he had made the Baboquivari Land and Cattle Company, a corporation, Hugo J. Donau, trustee, J. George Hilzinger, and Charles T Etchells, defendants; that certain judgments rendered against the Baboquivari Land and Cattle Company had been purchased by the defendant herein, and he had thereby become the owner of all such rights as pertained to said judgments and the levy of attachment thereunder, in and to the cattle described in said mortgage.

III.

That said defendant agreed, as a condition precedent to his taking any rights under said contract, to own and possess all of the said cattle branded as aforesaid with the Club brand; and the said defendant also agreed in the said contract, as a condition precedent to his taking any rights under said contract, to purchase from the firm of L. Zeckendorf & Company, who were then the owners thereof, a certain cattle ranging in said Pima county on the said Baboquivari Land and Cattle Company's range, and branded Z, and to pay L. Zeckendorf & Co. for the same, and to obtain from L. Zeckendorf & Company all their right, title and interest in and to said cattle and horses bearing the said Z brand.

48 IV.

That the plaintiff relying upon the performance by the defendant of the conditions precedent as aforesaid, permitted the defendant to enter into possession of all of the said cattle bearing the said Club brand, for the purpose of enabling the defendant to segregate therefrom and remove a certain quantity of the Z cattle running with the said Club brand of cattle.

V.

That the defendant failed, neglected and refused to perform the said conditions precedent, and taking advantage of the possession of the said cattle branded with the said Club brand, removed from the said county of Pima twelve hundred and ten (1210) head of cattle branded with the Club brand. That the removal of the said Club brand of cattle by the said defendant from the county of Pima, and Territory of Arizona, was wrongful and unlawful and a tortious conversion of the property.

VI.

That the twelve hundred and ten (1210) head of cattle branded with the said Club brand were so converted and removed out of the county of Pima and Territory of Arizona in the year 1895; and that the said cattle were on said date worth the sum of seven dollars ($7.00) per head, or a total of eight thousand four hundred and seventy dollars ($8,470). That by wrongfully removing the said cattle from the county of Pima and Territory of Arizona, the defendant wrongfully took the same, and in violation of his contract and agreement with the plaintiff, and deprived the plaintiff of the right of subjecting them to the payment of his said chattel mortgage, and plaintiff was thereby damaged in the sum of eight thousand
49 four hundred and seventy dollars ($8,470).

Conclusions of Law.

As conclusions of law from the foregoing facts, the court now hereby finds, decides and holds, that the plaintiff has been damaged and injured by the defendant in the sum of eight thousand four hundred and seventy dollars ($8,470); that said damage has been occasioned by the wrongful and tortious act of the defendant, and that judgment should be rendered against the defendant, in favor of the said plaintiff, for the said sum of eight thousand four hundred and seventy dollars ($8,470), with interest thereon from the date hereof until paid at the rate of seven per cent. (7 %) per annum; and judgment is hereby ordered to be entered accordingly.

Dated —.

WEBSTER STREET, *Judge.*

(Endorsed:) "2579. Findings of fact and conclusions of law. Filed Dec. 22, 1899. Clinton D. Hoover, clerk."

(Title of Court and Cause.)

Decree.

This cause came on regularly for trial on the 4th day of May, A. D. 1899, Messrs. Hereford & Hazzard appearing as counsel for the plaintiff, and Messrs. Barnes & Martin and C. W. Wright appearing as counsel for the defendant. A trial by jury having been expressly

waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury, whereupon Frank H.
50 Hereford, George P. Scholefield, S. M. Franklin, C. F. Schumacher, James G. James and Alfred Steinfeld were examined as witnesses on behalf of the plaintiff, and the defendant and C. F. Schumacher were examined as witnesses on behalf of the defendant, and certain documentary evidence was introduced by the plaintiff and by the defendant, and the evidence being closed the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court delivered its findings and decision in writing, which was filed, and ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that George H. Appel, the plaintiff, do have and recover of and from James G. James, the defendant, the sum of eight thousand four hundred and seventy dollars ($8,470), with interest thereon at the rate of 7 % per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $229.90, and that the said sum of $8699.90, and interest be paid by the said defendant in gold coin of the United States. Judgment rendered this — day of —— 1899.

WEBSTER STREET, *Judge.*

(Endorsed:) "2579. Decree. Filed Dec. 22, 1899. Clinton D. Hoover. clerk."

(Title of Court and Cause.)

Motion for New Trial.

Now comes the defendant by Barnes & Martin and C. W. Wright his attorneys, and moves the court to set aside the judgment entered herein, and grant a new trial, on the following grounds,
51–66 to wit:

1st. The court erred in rejecting evidence offered by defendant.

2nd. The court erred in admitting improper, incompetent and irrelevant evidence over the objection of the defendant.

3rd. The court erred in not rendering judgment for defendant.

4th. The court erred in holding that said contract is based upon any condition precedent.

5th. The court erred in holding that the alleged condition precedent in said contract claimed was not thereafter waived by the parties thereto.

6th. The court erred in not finding the issues for the defendant.

7th. The evidence does not sustain the judgment.

8th. The judgment is contrary to the law and the evidence.

BARNES & MARTIN AND
C. W. WRIGHT,
Attorneys for Defendant.

(Endorsed:) "2579. Motion for new trial. Filed Jan. 11, 1900. Clinton D. Hoover, clerk."

(Title of Court and Cause.)

Order Continuing Cause.

It is hereby ordered that the hearing on the motion for a new trial in the above entitled cause be continued until the next term of this court.

At chambers, Phœnix, March 30, 1900.

WEBSTER STREET, *Judge.*

(Endorsed:) "2579. Order continuing cause for the term. Filed March 31, 1900. Clinton D. Hoover, clerk, by L. G. Davis, deputy."

* * * * * * *

67 (*Minute Entry of March* 31, 1900.)

GEORGE H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

It is by the court ordered that the hearing of the defendant's motion to set aside the judgment herein and for a new trial be, and the *said* is hereby continued until the next term of this court. (Q. 350-351.)

(*Minute Entry of July* 21, 1900.)

G. H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

This cause having been tried before the Hon. Webster Street, chief justice, and having been decided by him; and it appearing to the court that he has been unable to attend the present term o
68 this court to hear and determine the motion for a new trial herein, but will be able to do so at the next term of this court, therefore it is by the court ordered, that said motion for a new trial be continued for hearing until the next term of this court. (Q. 609.)

(*Minute Entry of March* 30, 1901.)

G. H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

This cause having been tried before the Hon. Webster Street, chief justice, and having been decided by him; and it appearing to the

court that he has been unable to attend the present term of this court to hear and determine the motion for a new trial herein, but will be able to do so at the next term of this court, therefore it is by the court ordered, that said motion for a new trial be continued for hearing until the next term of this court. (R. 84.)

(*Minute Entry of May 29, 1901.*)

G. H. APPEL, Plaintiff,
vs.
J. G. JAMES, Defendant. } 2579.

This matter came on this day regularly to be heard upon the motion of the plaintiff to vacate the order heretofore entered in this cause on March 31, 1900, continuing the motion for a new trial in this cause over for the term, Messrs. Hereford & Hazzard appearing as attorneys for the plaintiff, and Messrs. Barnes & Martin appearing as attorneys for the defendant. Whereupon the matter was fully submitted to the court, and the court being fully advised in the premises, does overrule and deny said motion. And thereupon the matter came on to be heard upon the motion of the plaintiff to vacate
the order heretofore entered in this cause on July 21, 1900,
69–202 continuing the motion for a new trial in this cause over for
the term. Whereupon the matter was fully submitted to the court, and the court being fully advised in the premises does overrule and deny said motion. The matter then came on to be heard upon the motion of the plaintiff to vacate the order heretofore entered in this cause on March 30, 1901, continuing the motion for a new trial in this cause over for the term. Whereupon the matter was fully submitted to the court and the court being fully advised in the premises, does overrule and deny said motion. And thereupon the matter came on to be heard upon the motion of the defendant to set aside the judgment and to grant a new trial herein. And the matter being fully submitted to the court, and the court being fully advised in the premises, does overrule and deny said motion, to which ruling of the court in overruling and denying said motion, the defendant, through his counsel aforesaid, excepts, and gives notice of his appeal to the supreme court of the Territory. (R. 297–298.)

* * * * * * *

203 In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant and Defendant,
vs.
GEORGE H. APPEL, Appellee and Plaintiff. } Motion.

The appellee moves this honorable court to dismiss the appeal of appellant, and for cause shows:

I.

That the final judgment from which the appeal was prosecuted was rendered and entered on the 11th day of January, 1000:

II.

That thereafter and on the said 11th day of January, 1900, appellant filed a motion for a new trial.

III.

That appellant took no further action in said cause until the 29th day of May 1901, when he presented his motion for a new trial.

IV.

That on the 31st day of March, 1900, the term of court at which the said judgment was rendered was ended and terminated by operation of law.

V.

That on the said 31st day of March, 1900, it was "by the
204 court ordered that the hearing of the defendant's motion to set aside the judgment herein and for a new trial be, and the *said* is hereby continued until the next term of this court," no reason being given therefor.

VI.

That thereafter and on July 21, 1900, the said 21st day of July being the last day of the term of court then being held, another order continuing the hearing of the motion for a new trial over until the next term of court was made; the reason for such continuance being "that the Honorable Webster Street, chief justice, having sat at the trial of the cause, and having since been unable to attend the court to hear and determine a motion for a new trial, would be able to do so at the next term of court."

VII.

That thereafter, and on March 30th, 1901, the said March 30th being the last day of the term of court then being held, another order was made continuing the hearing of the motion for a new trial until the next term of court. The reasons given for such continuance being the same as in the last above mentioned order.

VIII.

That thereafter and on April 17th, 1901, appellee filed his motions to vacate the orders heretofore entered in this cause on March
205 31, 1900, on July 21, 1900, and on March 30, 1901, on the ground "that the court had no power to make said orders by reason of the fact that the statutes of the Territory of Arizona

require that a motion for a new trial shall be determined by the court at the term at which the motion shall be made, and by reason of the further fact that there being no ruling upon said motion for a new trial during the term at which it was filed, it was by the adjournment of the term of said court denied;" and upon the further ground "that the court exceeded its jurisdiction in making the said order." Said motions came on regularly to be heard on May 29th, 1901, and each thereof upon being argued and submitted to the court was by the court denied.

IX.

That thereupon, and on the said 29th day of May, 1901, the motion for a new trial was submitted to the court; the appellee neither argued nor took any action in recognition of appellant's right to have the motion for a new trial heard; and the court thereupon over-ruled and denied said motion for a new trial.

X.

And thereupon, and on the said 29th day of May, 1901, appellant gave notice of appeal to the supreme court of the Territory of Arizona.

Wherefore, it appears from the record in this action that the appeal from the said judgment rendered as aforesaid on the 11th day of January, 1900, was not attempted to be taken until May 29th, 1901, more than one year after the said judgment had been
206 rendered, and at the end of the third term of court after the said judgment had been rendered: All of which appears more fully from the record herein.

Wherefore, appellee moves as aforesaid, that the appeal of appellant be dismissed.

Respectfully submitted.

HEREFORE & HAZZARD,
Attorneys for Appellee.

(Endorsed:) No. 766. In the supreme court, of the Territory of Arizona. Jas. G. James, appellant and def't, *vs.* Geo. H. Appel appellee and plaintiff. Motion. Filed this first day of November, 1901, Thomas Grindell, clerk. Service admitted this 31st day of October, 1901, Barnes & Martin & S. M. Franklin, attorneys for appellant.

207 In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant,
vs.
GEORGE H. APPEL, Appellee. } No. 766.

Be it remembered that on Saturday November 2nd, 1901, that being a regular juridical day of the November term, 1901 of said court, the following record of this case was made for this day, to-wit

Title of Cause.

It is ordered that the motion to dismiss appeal, filed herein by appellee, be submitted.

On Wednesday, January 29th, 1902, that being a regular juridical day of the January term, 1902, of said court, the following record in this case for this day was made, to-wit:

Title of Cause.

The motion to dismiss appeal, filed herein by appellee, having been heretofore submitted and by the court taken under consideration and the court having considered the same and being fully advised in the premises: It is ordered that said motion be sustained and the appeal be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the ap-
208 pellee herein, do have and recover of and from James G. James the appellant herein, and Albert Steinfeld and Geo. P. Myers, sureties on appeal bond herein, his costs in this court taxed at thirty-two and 25/100 ($32.25) dollars, and his costs in the district court in this cause incurred and have execution therefor.

In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant,
vs.
GEORGE H. APPEL, Appellee. } No. 766.

Frank H. Hereford being duly sworn on oath says that he is one of the attorneys for appellee in the above entitled cause, and that appellee's costs in said cause are as follows, viz.:

For 2 briefs filed in said cause, 20 pages @ $1.00.....	$20.00
For supreme court clerk's fees, to date, in said cause..	12.25
	$32.25

FRANK H. HEREFORD.

Subscribed and sworn to before me this 21st day of Feb. 1902.

[SEAL.]

EMMA A. MILLER,
Notary Public.

My com. expires Oct. 12, 1902.

(Endorsed:) No. 766. Supreme court Arizona. James G. James *vs.* George H. Appel. Cost bill. Filed Feb'y 24, 1902. James Allen Cox, clerk.

209 In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

Assignment of Errors.

Comes now the defendant and appellant and files the following assignment of errors upon which he will rely on his appeal from the decree made by this honorable court on the 29th day of January, 1902, dismissing his appeal from the order of the district court of the Territory of Arizona, denying his motion for a new trial:

I.

That the supreme court of the Territory of Arizona erred in dismissing defendant's and appellant's appeal from the order denying a new trial in the district court of Arizona, on the ground that said appeal was not taken within twenty days from the time of the rendition of the said order denying a new trial. Said judgment being based upon the ground that the statute of Arizona itself operated to deny defendant and appellant a new trial at the termination of the term at which the motion for a new trial was made, if not acted upon by the court within that time, and that thereby the
210 orders of the district court postponing the hearing of the motion for a new trial and the failure of the court to pass upon that motion for a new trial until the 29th day of May, 1901, and the denial of appellant's motion by the court upon that date, had no effect upon the time for appeal, but that said statute, by failure of the court to pass upon the motion at the term on which it was made, did, upon the expiration of that term, and by operation of law, operate to deny defendant and appellant a new trial and that his time for appeal ran from that date.

II.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the questions therein presented at the term at which the motion was made is unconstitutional and void on the ground that the same is in conflict with the organic act of the Territory of Arizona in this: that the organic act of the Territory of Arizona provides a jurisdiction of the courts shall be as limited by law, with which provision this statute is in conflict.

III.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the ques-

tions therein presented at the term at which the motion was made is unconstitutional and void in that it is an invasion of the judicial by the legislative power.

THOMAS B. BISHOP,
Attorney for Defendant and Appellant.

211 (Endorsed:) No. 766. In the supreme court of the Territory of Arizona. George H. Appel, plaintiff and respondent, *vs.* James G. James, defendant and appellant. Assignment of errors. Filed June 24th, 1902. James Allen Cox, clerk. By Angie B. Parker, deputy.

In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

Petition for Appeal.

The above named defendant and appellant, James G. James, conceiving himself aggrieved by the order of this court, entered on the 29th day of January, 1902, dismissing his appeal from an order of the district court of the State of Arizona denying his motion for a new trial in the above entitled case, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that this, his appeal, may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, together with a statement of facts as provided for by the act of April 7th, 1874, c. 80 sec. 2, 18 Statutes, 27, 28, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 23 day of June, 1902.

THOMAS B. BISHOP,
Attorney for Defendant and Appellant.

212 In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

Order.

And now, to-wit, on the 23rd day of June, 1902, it is ordered that the appeal may be allowed as prayed for.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 766. In the supreme court of the Territory of Arizona. George H. Appel, plaintiff and respondent, *vs.* James G. James, defendant and appellant. Petition for appeal and order allowing appeal. Filed June 24th, 1902, James Allen Cox, clerk. By Angie B. Parker, deputy.

213 In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant and Defendant, *vs.* GEORGE H. APPEL, Appellee and Plaintiff. } Certified Statement of Facts.

I, Edward Kent, chief justice of the supreme court of the Territory of Arizona, for and on behalf of said court, hereby certify the following statement to be the true and correct statement of the facts upon which the motion to dismiss the appeal of James G. James, made and entered on the 11th day of January, 1900, was determined by this court on the 29th day of January, 1902.

I.

That the final judgment of the district court in the sum of eight thousand four hundred and seventy ($8470.00) dollars, with interest thereon from date until paid at the rate of seven per cent. per annum, was entered on the 11th day of January, 1900, against James G. James, and in favor of George H. Appel.

II.

That thereafter on the 11th day of January, 1900, James G. James filed a motion for a new trial, which motion was filed within the time required by law.

214 III.

That on the 31st day of March, 1900, the term at which said judgment was rendered and entered, and in which said motion for a new trial was made was ended and terminated by operation of law.

IV.

That on the 30th day of March, 1900, it was by the Honorable Webster Street, chief justice of the supreme court of the Territory, and judge presiding over the district court, by which said judgment was rendered by chamber order entered of minutes, ordered that said motion for a new trial and to set aside the judgment, "be and the same is hereby continued until the next term of this court," and that said order was made before said term expired.

V.

That the next succeeding term to that which terminated on the 31st day of March, 1900, terminated on the 21st day of July, 1900.

VI.

That on said 21st day of July, 1900, the same being the last day of said term, an order was made by the judge of the district court, George R. Davis presiding, having jurisdiction of said motion for a new trial, and motion to set aside judgment continuing the hearing of said motion over until the next term of court. Said judge assigning the reason for such continuance as follows:

215 "That the Honorable Webster Street, chief justice, having sat in the trial of the cause and having since then been unable to attend the court to hear and determine the said motion for a new trial, and it further appearing that he will be able to do so during the next term, said motion for a new trial is hereby continued until said next term."

VII.

That thereafter and on the 30th day of March, 1901, said 30th day of March being the last day of the term next succeeding that terminating on the 21st day of July, 1900, an order was made by the judge of the district court, George R. Davis presiding, having jurisdiction of said motion for a new trial, and motion to set aside judgment continuing the hearing of said motion over until the next term of court. Said judge assigning the reason for such continuance as follows:

"That the Honorable Webster Street, chief justice, having sat in the trial of the cause and having since then been unable to attend the court to hear and determine the said motion for a new trial, and it further appearing that he will be able to do so during the next term, said motion for a new trial is hereby continued until said next term."

VIII.

That thereafter on the 29th day of May, 1901, said 29th day of May being a day in the term next succeeding that terminating on the 30th day of March, 1901, the Honorable Webster

216 Street heard and denied James G. James' motion to vacate and set aside the judgment and for a new trial.

IX.

That thereafter and upon said 29th day of May, 1901, said James G. James gave notice of appeal to the supreme court of the Territory of Arizona from the said order of the Honorable Webster Street denying his motion to set aside judgment and grant a new trial.

X.

That this court upon the motion made and filed by George H. Appel, in the above entitled action, dismissed the appeal of James G. James, appellant herein, on the ground that same was not made and taken within the time required by law.

I hereby approve the above statement as a correct statement of the facts in the above entitled cause as to the orders for the continuance of the hearing of the motion for a new trial, and as to the terms in which said orders were made.

WEBSTER STREET,
Ex Chief Justice of the Territory of Arizona and Judge Presiding Over the District Court at the Trial and Hearing of said Motion for a New Trial.

I hereby certify that the above entitled statement is a true statement of the facts and decision in the above entitled action.

EDWARD KENT,
[SEAL.] *Chief Justice of the Territory of Arizona.*

217 (Endorsed:) No. 766. In the supreme court of the Territory of Arizona. James G. James *vs.* Geo. H. Appel. Certified statement of facts. Filed June 25, 1902. James Allen Cox, clerk. By Angie B. Parker, deputy.

In the Supreme Court of the Territory of Arizona.

JAMES G. JAMES, Appellant and Defendant,
vs.
GEO. H. APPEL, Plaintiff and Appellee.

Know all men by these presents: That James G. James, as principal, and Albert Steinfeld and Edward W. Bowers, as sureties, are held and firmly bound nnto Geo. H. Appel in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Geo. H. Appel, his attorneys, executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with out seals and dated this 23rd day of June, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the supreme court of the Territory of Arizona, in the suit pending in said court, wherein James G. James, is defendant and appellant and Geo. H. Appel is plaintiff and appellee, a decree was rendered against said James G.
218 James on the 29th day of January, 1902, and said James G. James having obtained from said court an order allowing an appeal to the United States Supreme Court to reverse said decree

made in said suit on said 29th day of January, 1902, and a citation directed to the said Geo. H. Appel is about to be issued citing and admonishing him to appear at the United States Supreme Court to be holden in the city of Washington, District of Columbia;

Now, the condition of the above obligation is such that if the said James G. James shall prosecute his said appeal, and shall answer all damages and costs that may be awarded against him, or if he shall make good his plea, that the above obligation is to be void, otherwise to remain in full force, virtue and effect.

J. G. JAMES,
Appellant and Defendant.

ALBERT STEINFELD,
EDWARD W. BOWERS,
Sureties.

TERRITORY OF ARIZONA, *Pima County,* } *ss:*

Before me Harry Y. Harrison, a notary public in and for Pima county, Arizona Territory, on this day personally appeared Albert Steinfeld and E. W. Bowers the sureties whose names are subscribed to the foregoing bond as sureties, who each for himself deposes and says that he is a resident and freeholder or householder within the Territory of Arizona; that he is at least worth the amount for which he has become surety on said bond, over and above his just debts and liabilities and exclusive of property exempt from execution and forced sale.

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ALBERT STEINFELD.
E. W. BOWERS.

Subscribed and sworn to before me this 23d day of June 1902.

[SEAL.]

HARRY Y. HARRISON,
Notary Public, Pima Co., Ariz.

My commission as notary public expires June 6th, 1904.

(Endorsed:) I hereby approve the within bond and the sureties therein named. Phœnix, June 25, 1902. Edward Kent, chief justice of the supreme court of Arizona. No. 766. In the supreme court of the Territory of Arizona. James G. James, appellant and defendant, *vs.* Geo. H. Appel, plaintiff and appellee. Bond of appellant on appeal to the United States Supreme Court. Filed June 25, 1902, James Allen Cox, clerk. By Angie B. Parker, deputy.

220 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, James Allen Cox, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing typewritten pages (numbered from 1 to 17 inclusive) to be full, true and correct copies of the motion to dismiss, cost bill; assignment of errors; petition for and allowance of appeal; certified statement of facts; bond on appeal, and all orders and proceedings of said court had and entered of record, in a certain case lately pending in said court wherein James G. James was appellant and George H. Appel was appellee, as the same remain of record and on file in my office.

Also that the citation attached hereunto is the original citation issued by said supreme court of the Territory of Arizona.

I further certify that the printed copy of the abstract of record attached hereunto is one of the copies of abstract of record filed in said cause, as the same remain of record and on file in my office.

Seal Supreme Court of Arizona.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 18th day of July A. D., 1902, at Phœnix, Arizona.

JAMES ALLEN COX,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER,
Deputy Clerk.

221 In the Supreme Court of the Territory of Arizona.

GEORGE H. APPEL, Plaintiff and Respondent,
vs.
JAMES G. JAMES, Defendant and Appellant.

UNITED STATES OF AMERICA, ss:

To George H. Appel, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to and — allowing an appeal filed in the office of the clerk of the supreme court of the Territory of Arizona, in a case therein pending, in which James G. James is appellant and defendant and you plaintiff and appellee, to show cause, if any there be, why the judgment rendered against the defendant and appellant, mentioned in the petition and order allowing the appeal on file in the clerk's office of the supreme court of the Territory of Arizona,

should not be corrected and why speedy justice should not be done to the parties in that behalf.

222 Witness the Honorable Edward Kent chief justice of the supreme court of the Territory of Arizona this 25th day of June, 1902, and of the Independence of the United States 126.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

223 OFFICE OF SHERIFF, } ss:
County of Pima, }

I hereby certify that I received the within citation on the 27th day of June A. D. 1902, at the hour of 8.30 a. m., and personally served the same on the 27th day of June 1902, at the hour of 8.45 a. m. on George H. Appel being the appellee named in said citation, by delivering to Mr. Hazzard a member of the firm of Hereford and Hazzard, attorneys for George H. Appel in the within named action, in the county of Pima, Territory of Arizona, a true copy of said citation.

Dated this the 27 day of June A. D. 1902.

FRANK E. MURPHY, *Sheriff,*
By E. DRACHMAN, *Deputy.*

Fees.

Service	$1.50	Pima Co.
Copies		
Mileage 1	30	
Total	$1.80	
Notary fee	75	
Extra expense	2.00	
Total	4.55	

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GEORGE H. APPEL }
vs.
JAMES G. JAMES. }

TERRITORY OF ARIZONA, }
County of Pima. }

E. Drachman being first duly sworn deposes and says that he is deputy sheriff of the county of Pima, Territory of Arizona. That he has made due and diligent search for George H. Appel appellee named in the citation to which this affidavit is attached and that he has been unable to find said George H. Appel within the Territory of Arizona. That on the 27th day of June 1902 he served a true

copy of the citation to which this affidavit is annexed upon Seth E. Hazzard a member of the firm of Hereford and Hazzard, attorneys for George H. Appel, in the above entitled action, by delivering personally to said Seth E. Hazzard at 8.45 o'clock on the 27th day of June 1902 in the county of Pima, Territory of Arizona, a true copy of the citation to which this affidavit is annexed.

E. DRACHMAN,
Deputy Sheriff.

Subscribed and sworn to before me this 27th day of June, A. D., 1902.

[Seal of William F. Cooper, Notary Public, Pima Co., Arizona Terr.]

WILLIAM F. COOPER,
Notary Public, Pima County, Arizona Territory.

My commission expires March 13, 1905.

225 [Endorsed:] No. 766. In the supreme court of the Ter-itory of Arizona. George H. Appel, plaintiff and respondent, *vs.* James G. James, defendant and appellant. Citation. Filed July 16th 1902 James Allen Cox clerk. By Angie B. Parker deputy. Thomas B. Bishop, attorney for appellant, 532 Market St., San Francisco, Cal.

226 In the Supreme Court of the United States.

JAMES G. JAMES, Appellant,
vs.
GEORGE H. APPEL, Appellee.

Statement of Errors upon Which Appellant Intends to Rely, and Portions of the Record Necessary in His Opinion for the Consideration Thereof.

Comes now the defendant and appellant, and files the following assignment of errors upon which he will rely upon this his appeal from the decree made by the honorable supreme court of the Territory of Arizona on the 29th day of January, 1902, dismissing his appeal from the order of the district court of the Territory of Arizona denying his motion for a new trial, together with a statement of such portions of the record, filed in this court, as he thinks necessary for the consideration thereof.

Statement of Errors.

I.

That the supreme court of the Territory of Arizona erred in dismissing defendant's and appellant's appeal from the order denying a new trial in the district court of Arizona, on the ground that said appeal was not taken within twenty days from the time of the ren-

dition of the said order denying a new trial. Said judgment being based upon the ground that the statute of Arizona itself
227 operated to deny defendant and appellant a new trial at the termination of the term at which the motion for a new trial was made, if not acted upon by the court within that time, and that thereby the orders of the district court postponing the hearing of the motion for a new trial and the failure of the court to pass upon that motion for a new trial until the 29th day of May, 1901, and the denial of appellee's motion by the court upon that date had no effect upon the time for appeal, but that said statute, by failure of the court to pass upon the motion at the term on which it was made, did, upon the expiration of that term, and by operation of law, operate to deny defendant and appellant a new trial and that his time for appeal ran from that date.

II.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the questions therein presented at the term at which the motion was made is unconstitutional and void on the ground that the same is in conflict with the organic act of the Territory of Arizona in this: That the organic act of the Territory of Arizona provides that the jurisdiction of the courts shall be as limited by law, with which provision this statute is in conflict.

III.

That the statute of Arizona purporting to deny a new trial by operation of law upon the failure of the judge to pass upon the questions therein presented at the term at which the motion was made is unconstitutional and void in that it is an invasion of the judicial by the legislative power.

228 *Statement of Portions of Record Believed by Appellant Necessary for the Consideration of the Above Assigned Errors.*

Second amended complaint, folios 1–64;
Amended answer, folios 120–149;
Findings of fact and conclusions of law, folios 182–200;
Decree, folios 196–200;
Motion for a new trial, folios 200–204;
Order continuing cause, folios 204–205;
Minute order of Mar. 31, 1900, folios 267–268;
Minute order of July 21, 1900, folios 268–269;
Minute order of Mar. 30, 1901, folios 270–271;
Minute order of May 29, 1901, folios 271–276;
Together with motion to dismiss appeal, minute entries judgment, assignment of error, petition for allowance of appeal, certified statement of facts, bond on appeal, and citation.

THOS. B. BISHOP,
Attorney for Defendant and Appellant.

229 OFFICE OF THE SHERIFF, } ss:
Pima County, }

I, hereby certify that I received the within statement of errors and portions of the records, on the 3rd day of September, 1902, and personally served the same on the 5th, day of September, 1902 on Mr. Hazzard a member of the firm of Hereford and Hazzard by delivering and leaving a copy of said statement of errors and portions of the records, with the said Hazzard in the city of Tucson county of Pima, Territory of Arizona.

Dated this 6th day of September, 1902

FRANK E. MURPHY, *Sheriff,*
By E. DRACHMAN, *Deputy.*

Subscribed and sworn to before me this 6th day of September, A. D. 1902.

[Seal District Court, First District, Pima Co., Arizona.]

CLINTON D. HOOVER,
Clerk District Court, First Judicial District,
Territory of Arizona, in and for Pima County.

[Endorsed:] In the Supreme Court of the United States. James G. James, appellant, *vs.* George H. Appel, appellee. Statement of errors and portions of the record The original hereof filed with me Aug. 29, 1902. James H. McKenney, clerk Sup. Ct. U. S. Proof of service, of designation by app't under sec. 9 rule 10.

[Endorsed:] File No. 18,638. Supreme Court U. S. October term, 1903. Term No. 108. James G. James appellant *vs.* Geo. H. Appel Proof of service of designation by appellant under section 9" rule 10. Filed June 23, 1903.

Endorsed on cover: File No. 18,638. Arizona Territory supreme court. Term No. 108. James G. James, appellant, *vs.* George H. Appel. Filed August 5th, 1902.